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Chairman: Mr. Böhlke (Vice-Chairman) ..... (Brazil)

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In the absence of Mr. Benmehidi, Mr. Böhlke (Brazil), Vice-Chairman, took the Chair.

The meeting was called to order at 10.15 a.m.

Agenda item 81: Report of the International Law Commission on the work of its sixty-first session (*continued*) (A/64/10 and A/64/283)

1. **Mr. Aguiar Patriota** (Brazil) said that interaction and communication between the members of the Commission and Member States could be further strengthened and improved; both sides would benefit from a closer and more fluid exchange. Even when the Commission's draft articles did not become embodied in a treaty, international judicial organs tended to rely on them and States tended to seek guidance from them, a process that gradually led to the formation of international customary norms. Therefore a larger group of States should be in a position to contribute effectively to the debates.

2. He noted with satisfaction the successful conclusion of the first reading of the draft articles on responsibility of international organizations, with commentaries. His delegation intended to submit written comments and observations as requested. The topic was complex, and practice in the matter was not abundant. Although the draft articles were well balanced and covered the most important aspects of the topic, some draft articles required further consideration, particularly those concerning attribution of conduct to an international organization and circumstances precluding wrongfulness.

3. His delegation supported the restrictive approach taken with regard to countermeasures in draft article 21, paragraph 2, but was concerned about the wording of draft article 20 on self-defence. Although the right of self-defence might be applicable in the context of United Nations peacekeeping operations, for example, the very general reference to international law at the end of the draft article should be clarified to avoid any possible violation of the Charter of the United Nations.

4. It would also be wise to clarify some of the vague or imprecise terms used in the draft articles, such as "serious breach", "gross or systematic failure" and even "aids or assists". Since the draft articles would be applicable to a wide range of international organizations, it was necessary to take into account their varied nature and to try to anticipate how they were evolving.

5. His delegation welcomed the general provisions placed in Part Six. The internal rules of a particular organization should play a key role in guiding the relations between the organization and its member States. The specific reference to the Charter in draft article 66 was also a step in the right direction.

6. **Mr. Appreku** (Ghana) said that his delegation welcomed the completion, on first reading, of a set of draft articles on the responsibility of international organizations, with commentaries. The degree of responsiveness of Governments to requests for information on State practice could be due, not to bureaucratic inertia, but to the degree of importance Governments attached to a given topic. In that light, his delegation hoped that at its next session the Commission would be able to consider the topic of immunity of State officials from foreign criminal jurisdiction and make further progress on the topics of expulsion of aliens, the obligation to extradite or prosecute, the protection of persons in the event of disasters and shared natural resources (on the question of oil and gas). In future, the Commission might wish to consider clustering or consolidating topics bearing on the same area of international law. A lack of response could also reflect the scarcity of State practice and might be a sign to the Commission that a particular topic was not ripe for codification or progressive development.

7. In pursuit of its responsibility to reach out to other bodies to exchange views on questions of international law, the Commission might wish to explore the possibility of constructive engagement with the newly established African Union Commission on International Law in order to ensure that regional perspectives were brought to bear on the International Law Commission's work.

8. His delegation supported the Commission's call for the General Assembly to restore the payment of honorariums to support the research work of special rapporteurs, especially those from developing countries. The United Nations would find it difficult to achieve its goals in peace and security, human rights and development without anchoring its efforts in respect for the rule of law. There was the need for a paradigm shift within the United Nations to accord international law a larger place in its priorities. His delegation therefore supported any measures to increase funding for the work of the Commission and

the Office of Legal Affairs, preferably from the regular budget.

9. With regard to the draft articles on responsibility of international organizations, his Government planned to provide written comments as requested. By way of preliminary observations, his delegation understood, with respect to draft article 1 on scope, that the reference to the international responsibility of a State for the internationally wrongful act of an international organization in paragraph 2 was intended to fill a gap in the articles on the responsibility of States for internationally wrongful acts. However, it would be preferable to limit the scope of the topic to the international responsibility of an international organization and to deal with the international responsibility of a State for the internationally wrongful act of an international organization as an aspect of the circumstances that would determine the extent of the latter's responsibility. However, if the current formulation was maintained, paragraphs 1 and 2 should be harmonized by rewording paragraph 2 as follows: "The present draft articles also apply to the international responsibility of a State for an act by an international organization that is wrongful under international law".

10. The legal status of States as primary subjects of international law differed qualitatively from that of international organizations. Therefore, caution should be exercised in drawing parallels with the articles on State responsibility. Moreover, the term "international organization" needed to be clarified, in view of the unique nature of the United Nations as an Organization founded to save succeeding generations from the scourge of war and mandated under Article 2, paragraph 6, of the Charter to ensure that even States not Members of the United Nations acted in accordance with its principles. Moreover, the fact that the International Court of Justice, a part of the Organization, was designated as the forum of choice for dispute settlement in the constituent instruments of many other international organizations had serious implications for situations in which one such international organization might seek to bring a claim against the United Nations.

11. Draft article 6 utilized the criterion of effective control over conduct of an organ or agent placed at the disposal of an international organization in attributing that conduct. In that regard, it was important to clarify, for example, what the limits of international responsibility might be where the agent or organ was a regional organization mandated to perform peacekeeping operations on behalf of an international organization on the basis of a Security Council resolution.

12. The draft articles and commentaries were perhaps overly ambitious, in the sense that they appeared to anticipate possible scenarios that could turn out to be, not questions of law that should be clarified by the draft articles, but questions of fact or mixed questions of fact and law to be determined by a tribunal when a claim was brought. In much human rights jurisprudence, determining effective control was held to be a question of fact. Similarly, the question of consent raised in draft article 19 or the question of intent to avoid compliance raised in draft article 60 might be determined as a question of fact or a mixed question of fact and law by a tribunal seized of the matter. Nor was there any need for an explicit provision as to when the Charter of the United Nations should take precedence over other rules of international law, since the international tribunal hearing the case would decide that issue as a matter of law.

13. With regard to draft article 20, to include self-defence in the context of international organizations as one of the circumstances precluding wrongfulness might introduce a controversial concept of collective self-defence in respect of an international organization to be exercised by the group of States constituting its membership; that notion could be subject to abuse. To the extent that such a concept of collective self-defence, as opposed to collective security, might be inconsistent with the Charter, draft article 20 should be reconsidered.

14. With regard to draft article 63 (*lex specialis*), although it some cases it might be necessary to have recourse to the rules of the organization in assessing the degree of responsibility of an international organization, one should be careful not to allow organizations to invoke their internal rules as justification for breaches of international legal obligations, just as States were not allowed to invoke the provisions of their constitutions or municipal law as justification for violating their international obligations.

15. **Mr. Pírez Pérez** (Cuba) said that the topic of responsibility of international organizations was complex and required further serious consideration by

the Commission. Most of the draft articles displayed a high degree of generality. In particular, the connection between the responsibility of international organizations and the responsibility of States with respect to reparation for an internationally wrongful act required deeper analysis, taking into account the input from States and organizations. Moreover, international organizations should have the obligation, similar to that incumbent on States, to cooperate, within the framework of their constituent instruments, in putting an end to a serious breach committed by another organization. His delegation was working on an analysis of that issue to contribute to the work of the Commission. The Commission should strengthen its interaction with Member States in order to develop drafts that met their interests and concerns, and States in turn should contribute more actively in response to the Commission's questions.

16. **Mr. Gouider** (Libyan Arab Jamahiriya) said that his delegation intended to submit written comments and proposals on the questions set forth in paragraph 27 of the Commission's report relating to issues concerning international responsibility between States and international organizations; the initiative to give more thorough consideration to the relationship between the two was an important one. He welcomed the continuous improvement of the Commission's website and looked forward to its further development, not least in that it was a resource of interest to many outside the United Nations engaged in foreign affairs and in the legal, academic and professional fields. The International Law Seminar held in July 2009 in Geneva was also a welcome initiative that had enabled participants to familiarize themselves with the Commission's role in United Nations law-making. Such seminars were particularly important for developing countries, the specific needs of which should be taken into account by the committees responsible for selecting participants.

17. His delegation looked forward to further progress in the Commission's work and a more effective contribution from States with regard to such key topics as reservations to treaties, the obligation to extradite or prosecute (*aut dedere aut judicare*) and shared natural resources, in particular gas and oil. The Commission's work on those resources would be of practical significance for petroleum-producing States such as the Libyan Arab Jamahiriya, where marine and land-based oil deposits were adjacent to other States. Indeed, it would have an influence on — and might be influenced by — the system of joint oil exploitation in use between his country and some of its neighbours, a system that could be extended to others if current drilling operations were to lead to the discovery of transboundary oil resources.

18. He expressed the hope that the Commission's discussion on dispute clauses at its next session would take into account the relevant principles of international law, in particular those of equality and sovereignty, and explicit acceptance of the dispute-settlement mechanism. More importantly he noted the absence of any report or work on the subject of immunity of State officials from foreign criminal jurisdiction. Given the paramount importance of that topic and its link with the principle of universal jurisdiction, the scope and application of which was a matter of concern to many States and regional organizations, including the African Union, it had been discussed in such distinguished legal forums as the International Court of Justice. It should therefore be afforded special priority in the work of the Commission.

19. States had a responsibility to contribute effectively to the work of the Commission and its special rapporteurs in order to further their efforts and assist in the achievement of the intended objectives. To that end, it was essential for States to make the most of the independent legal expertise embodied in the Commission and to be more diligent in submitting comments and observations, including on legislation and agreements relevant to the topics under consideration. Equally essential to minimizing existing difficulties was the need to implement resolutions adopted by the General Assembly. Its resolution 63/123, for instance, invited voluntary contributions to the trust fund established by the Secretary-General to address the backlog relating to the *Yearbook of the International Law Commission*, a publication that was vital to an understanding of the Commission's work and to promoting the rule of law in international relations.

20. An effective response to the concerns voiced in the Commission's report was also needed, particularly with regard to honorariums for special rapporteurs, on whose year-round research the Commission undoubtedly relied in progressing with its work. The requirements of such research often went beyond the assistance provided, which should instead be

commensurate with the responsibilities, time and resources involved in the task. The provision of research project grants for the work done by special rapporteurs was therefore worthy of consideration. Lastly, in the interest of further enhancing the dialogue with the Commission, special rapporteurs should be afforded the opportunity to attend meetings of the Sixth Committee during its consideration of their topics, an opportunity that was presently confined to the President of the Commission and one or two special rapporteurs.

21. **Mr. Hetsch** (European Commission), speaking as an observer for the European Community, said that the Community congratulated the International Law Commission on its adoption on first reading of the draft articles, with commentaries, on responsibility of international organizations, which was a topic of special interest to the Community. The European Community's contributions had been aimed at ensuring that the draft articles allowed sufficient room for the specificities of a regional integration organization that was, internally, at an advanced stage in the transfer of competences from member States to the organization and, externally, a party to a large number of international treaties. One of its concerns was the need to allow for special rules of attribution and responsibility in cases where the member State was merely implementing a binding rule of the international organization. In that regard, the Community welcomed the Special Rapporteur's willingness to re-examine certain issues in the light of comments received and new jurisprudence.

22. The Community noted with satisfaction that former draft article 28 entitled "International responsibility in case of provision of competence to an international organization" had been recast as draft article 60 with the title "Responsibility of a member State seeking to avoid compliance", a distinct improvement. The commentary, however, stated that "assessment of a specific intent" was not required and that "circumvention may reasonably be inferred from the circumstances". In the Community's view, some basic or general level of intent on the part of the member State should be required.

23. Given the very diverse nature of international organizations, the European Community considered that there was a need for a *lex specialis* provision along the lines of draft article 63 for three reasons. First, such a provision formed part of the articles on State responsibility, and there was no reason not to include a similar clause in the current draft articles. Second, the draft articles were meant to be general in nature; it would be impossible for the Commission to identify all the relevant special rules. Third, some of the draft articles were based on limited practice and authority; the draft articles adopted by the Commission should not stunt the development of further international rules on the subject.

24. Overall, the draft articles and commentaries had been greatly improved. The European Community would take good note of the deadline for final comments and observations.

25. **Mr. Gaja** (Special Rapporteur) said that he was grateful for the many interesting comments on the draft articles on responsibility of international organizations and looked forward to more extensive written comments on practice by the deadline of 1 January 2011, so that he could reflect them in his next report and thus give the Commission the opportunity to complete the second reading of the draft articles by the end of the quinquennium.

26. The dearth of relevant practice certainly did affect the quality of the draft articles, some of which might appear to be too theoretical or to provide solutions insufficiently tested by practice. Unfortunately, if unsupported provisions were eliminated, in some cases their absence would imply a negative solution. For example, if distress and necessity were omitted from the chapter on circumstances precluding wrongfulness, the implication would be that an international organization, unlike a State, could never invoke them. The articles on State responsibility also contained some provisions based on scarce State practice, such as article 24 on distress. The fact that a circumstance precluding wrongfulness was rarely invoked was not a sufficient reason for omitting mention of it altogether.

27. Partly because of the dearth of available practice, some draft articles might appear vague. Although some were susceptible of improvement in the light of the comments made, to a certain extent the vagueness reflected the state of the law and the need to provide general rules, possibly only subsidiary rules, for a diverse set of international organizations. The problem of generality was inherent in any first attempt to codify a subject, and that was also true to some extent of the articles on State responsibility. For example, the

reference to an essential interest of the international community as a whole in draft article 24 also appeared in article 25 of the articles on State responsibility. Similarly, the phrase "aids or assists" in draft articles 13 and 57 also appeared in article 16 of the articles on State responsibility.

28. One reason for the dearth of available practice was that international organizations rarely submitted their disputes with States or other international organizations to third-party settlement. Promoting the compulsory settlement of disputes concerning the responsibility of international organizations, as had been suggested during the debate, would be an important aim and would certainly have to be considered if a decision was ever taken to utilize the draft articles to elaborate a convention. For the time being, however, it seemed preferable not to extend their scope to such complex and difficult issues.

29. **Mr. Petrič** (Chairman of the International Law Commission), introducing Chapter V of the report of the International Law Commission on the work of its sixty-first session (A/64/10), concerning reservations to treaties, said that the Commission had considered the fourteenth report of the Special Rapporteur (A/CN.4/614 and Add.1), which completed, inter alia, the examination of the procèdure for the formulation of interpretative declarations and addressed the question of the permissibility of reactions to reservations, of interpretative declarations and of reactions to interpretative declarations. Following debate, seven draft guidelines on issues relating to permissibility had been referred to the Drafting Committee. The Commission had provisionally adopted 32 draft guidelines, together with commentaries; for the sake of convenience, he would refer to them simply as "guidelines".

30. Guidelines 2.8.1 to 2.8.12 dealt with the formulation of acceptances of reservations. Guideline 2.8.1 concerned the tacit acceptance of reservations. It provided that a reservation was considered to have been accepted by a State or an international organization that had not objected to it within the time period provided for in guideline 2.6.13, which reiterated the rule set forth in article 20, paragraph 5, of the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

31. A further limitation on the time frame for tacit acceptance of a reservation was set forth in guideline 2.8.2 for cases in which unanimous acceptance was necessary in order for the reservation to be established. In stating that, such unanimous acceptance, once obtained, was final, the guideline implied, in particular, that a State or an international organization could not, once 12 months had elapsed from the date on which it had received notification of a reservation, validly object to the reservation when subsequently expressing its consent to be bound by the treaty, if the reservation had already been accepted by all the States and international organizations that were already parties to the treaty. The wording of the guideline also covered the scenario in which the requirement of acceptance was limited to certain parties to the treaty.

32. Guideline 2.8.3 enunciated the principle that a State or an international organization could expressly accept a reservation at any time. As explained in the commentary, such freedom was also enjoyed by a State or an international organization which had previously raised an objection to the reservation. Guideline 2.8.4 stated the requirement, established in article 23, paragraph 1, of the Vienna Conventions, that the express acceptance of a reservation must be formulated in writing. That requirement was necessitated by the importance of acceptances for the legal regime of reservations to treaties. Furthermore, guideline 2.8.5 stipulated that express acceptances were subject to the same rules of notification and communication as objections to reservations. Guideline 2.8.6, which specified that an express acceptance of a reservation prior to the confirmation of that reservation did not itself require confirmation, reproduced the rule stated in article 23, paragraph 3, of the Vienna Conventions.

33. Guidelines 2.8.7 to 2.8.11 concerned reservations to the constituent instrument of an international organization. Restating the rule laid down in article 20, paragraph 3, of the Vienna Conventions, guideline 2.8.7 provided that a reservation to the constituent instrument of an international organization required the acceptance of the competent organ of that organization, unless the constituent instrument provided otherwise. That rule, which the Commission considered to be logical in the light of the specific nature of the constituent instrument of an international organization, was confirmed by the relevant practice of international organizations. A definition of the "competent organ" of the organization was contained in guideline 2.8.8,

providing that, subject to the rules of the organization, such competence belonged to the organ competent to decide on the admission of a member to the organization, or the organ competent to amend the constituent instrument or the organ competent to interpret it. In that regard, the Commission believed that it was not possible to determine a hierarchy between such organs.

34. Guideline 2.8.9 specified that, although the acceptance of a reservation to a constituent instrument of an international organization should not be tacit, the admission of the author of the reservation as a member was tantamount to the acceptance of that reservation. The second paragraph then clarified that the individual acceptance of the reservation by members of the organization was not required.

35. Guideline 2.8.10 addressed the special case of a reservation to a constituent instrument of an international organization that had not yet entered into force. Since, in such a case, the "competent organ" to accept the reservation did not yet exist, the reservation was considered to be accepted — and the acceptance has to be regarded as final — if no signatory State or signatory international organization had raised an objection to it within 12 months from the date on which they had been notified of the reservation. The Commission regarded the solution as reasonable because it avoided leaving the reserving State in a prolonged undetermined status with respect to the organization.

36. Guideline 2.8.11 indicated that individual members of an international organization were not precluded from reacting to a reservation made to the constituent instrument of the organization — a point on which no position was taken by the Vienna Conventions. Although, as stated in the guideline, the opinions expressed through individual reactions were, in themselves, devoid of legal effects, the Commission considered that such reactions could make a useful contribution to the debate within the competent organ of the organization as to the permissibility of the reservation. They might also be taken into consideration, where appropriate, by a third party called to decide on the issue.

37. Guideline 2.8.12 provided that acceptance of a reservation was final, in that it could not be withdrawn or amended. The Commission considered that the finality of acceptance of a reservation, which was in the interest of legal certainty, was logically implied by article 20, paragraph 5, of the Vienna Conventions with regard to tacit acceptances, there being no reason why the solution should be different with regard to express acceptances.

38. Guidelines 2.4.0 and 2.4.3 bis dealt with the form and communication of interpretative declarations. The Commission considered that the validity of an interpretative declaration did not depend on the observance of a specific form or procedure. However, the influence of an interpretative declaration in practice depended to a large extent on wide dissemination, which therefore appeared to be in the interest of its author. That explained the recommendation contained in guideline 2.4.0 stating that "an interpretative declaration should preferably be formulated in writing", as well as the recommendation, formulated in guideline 2.4.3 bis, that the procedure established for the communication of reservations should also be followed with respect to the communication of a written interpretative declaration.

39. Guidelines 2.9.1 to 2.9.10 concerned the formulation of reactions to interpretative declarations. Guidelines 2.9.1 and 2.9.2 provided definitions of "approval" of, and "opposition" to, an interpretative declaration. The Commission was nevertheless aware that the few instances of express reactions that could be found combined elements of approval and opposition. Guideline 2.9.2 also recognized that oppositions to interpretative declarations could take various forms, including the formulation of an alternative interpretation. The two guidelines did not prejudge the question of the legal effects that could be produced by approval of, or opposition to, an interpretative declaration.

40. Guideline 2.9.3 dealt with the specific case of the "recharacterization" of an interpretative declaration, namely, a unilateral statement, made in reaction to an interpretative declaration, whereby a State or an international organization treated that declaration as a reservation. The wording of the guideline purported to convey the idea that the position expressed through the recharacterization was subjective and did not in itself determine the legal status of the declaration. However, the second paragraph recommended that, in recharacterizing an interpretative declaration as a reservation, States and international organizations should take into account guidelines 1.3 to 1.3.3, which

indicated the criteria for distinguishing between reservations and interpretative declarations.

41. Guideline 2.9.4 stated the principle that an approval of, opposition to, or recharacterization of an interpretative declaration could be formulated at any time by any contracting State or contracting international organization, or by any State or international organization that was entitled to become a party to the treaty.

42. In order to encourage wide dissemination of reactions to interpretative declarations, guideline 2.9.5 stated that approval, opposition or recharacterization should preferably be formulated in writing, thereby mirroring the recommendation contained in guideline 2.4.0 regarding interpretative declarations. Guideline 2.9.6, which was also a recommendation, stated that an approval, opposition or recharacterization should, to the extent possible, indicate the reasons why it was being made. That would help to enhance, with respect to interpretative declarations, the equivalent of the so-called "reservations dialogue". Broad dissemination of reactions to interpretative declarations was also the rationale for guideline 2.9.7, which recommended that the formulation and communication of such reactions should follow the rules on the formulation and communication of reservations.

43. Guideline 2.9.8 stated that, approval of, or opposition to, an interpretative declaration should not be presumed, while also recognizing, in the second paragraph, that in exceptional cases approval or opposition could be inferred from the conduct of the States or international organizations concerned, taking into account all relevant circumstances. Silence with respect to an interpretative declaration was addressed in guideline 2.9.9, which stated, in the first paragraph, that approval should not be inferred from mere silence. The rationale was that no rule of tacit approval comparable to that laid down in article 20, paragraph 5, of the Vienna Conventions with respect to reservations existed with respect to interpretative declarations. Silence in respect of an interpretative declaration could express either agreement or disagreement with the proposed interpretation. However, the second paragraph of guideline 2.9.9 recognized that, in exceptional cases, the silence of a State or an international organization might be relevant to determining whether, through its conduct and taking account of the circumstances, it had approved an interpretative declaration.

44. Guideline 2.9.10 provided that the guidelines applicable to reactions to reservations should apply, mutatis mutandis, to reactions to conditional interpretative declarations. However, the guideline appeared in brackets for the time being, pending a decision by the Commission as to the treatment to be given to conditional interpretative declarations in the Guide to Practice.

45. Guidelines 3.2 and 3.2.1 to 3.2.5 dealt with the assessment of the permissibility of reservations. Guideline 3.2, which was introductory in nature, referred to contracting States or contracting organizations, dispute settlement bodies and treaty monitoring bodies as entities that could assess the permissibility of reservations within their respective competences. The verb "assess" was to be regarded as neutral and did not prejudge the question of the authority underlying the assessment that might be made by the different entities listed. Although national courts were not expressly listed, the guideline did not exclude the possibility that such courts, as organs of the State, might also have competence to assess the permissibility of a reservation on the occasion of a dispute brought before them. Furthermore, specific mechanisms or procedures for the assessment of the permissibility of reservations could be established by the treaty itself.

46. Guideline 3.2.1 dealt specifically with the competence of treaty monitoring bodies to assess the permissibility of reservations. A treaty monitoring body was recognized to have competence "for the purpose of discharging the functions entrusted to it". However, the second paragraph made it clear that the legal effect of the conclusions formulated in that respect by a treaty monitoring body could not exceed that which derived from the performance of its monitoring role. In order to avoid any uncertainty in the matter, guideline 3.2.2 recommended that States and international organizations should specify, when concluding multilateral treaties that provided for treaty monitoring bodies, the nature and the limits of the competence of such bodies to assess the permissibility of reservations. Measures to the same ends were also recommended with respect to existing monitoring bodies. It should be stressed, however, that the Commission did not purport to take a position on the appropriateness of establishing treaty monitoring bodies.

47. Guideline 3.2.3 enunciated a general duty of reserving States and international organizations to

cooperate with the treaty monitoring bodies they had established. It also provided, in a recommendatory manner, that such States and international organizations should give full consideration to those bodies' assessments of the permissibility of reservations. The use of the conditional tense in the second part of the guideline was intended to reflect the fact that the treaty monitoring bodies referred to — as opposed to the dispute settlement bodies addressed in guideline 3.2.5 — lacked authority to adopt legally binding decisions.

48. Guideline 3.2.4 indicated that the competence of a treaty monitoring body to assess the permissibility of reservations was without prejudice to the competence of contracting States or contracting international organizations, or dispute settlement bodies, to do the same.

49. Guideline 3.2.5 addressed the case of dispute settlement bodies that were competent to adopt decisions binding upon the parties to a dispute, which also included regional human rights courts. It provided that, when the assessment of the permissibility of a reservation was necessary for the discharge, by the dispute settlement body, of its competence, such assessment was, as an element of the decision, legally binding upon the parties. The phrase "as an element of the decision" was intended to cover both the case in which the assessment of the permissibility of the reservation would constitute the subject matter of the dispute, and the more common situation in which the assessment would constitute a preliminary issue that needed to be resolved in order to settle a dispute.

50. Lastly, guidelines 3.3 and 3.3.1 dealt with certain consequences of the non-permissibility of reservations. Guideline 3.3 established the unity of the rules applicable to those consequences, regardless of which the grounds for non-permissibility set out in article 19 of the Vienna Conventions and restated in guideline 3.1 applied to the particular case. The majority within the Commission considered that neither the Vienna Conventions nor the practice of States or depositaries would justify drawing a distinction between the consequences of the formulation of a reservation in spite of a treaty-based prohibition and the formulation of a reservation incompatible with the object and purpose of the treaty.

51. Guideline 3.3.1 stated that the formulation of an impermissible reservation produced its consequences pursuant to the law of treaties and did not, in itself, engage the international responsibility of the author of the reservation. While a minority within the Commission had held that an exception to that principle could arise in the event of a reservation incompatible with a peremptory norm of general international law, the majority view was that, the mere formulation of a reservation could not, in itself, entail the international responsibility of its author. The phrase "in itself" nonetheless left open the possibility that the responsibility of the author of the reservation might be engaged as a result of the effects produced by the reservation.

52. Introducing Chapter VI of the Commission's report, on the expulsion of aliens, he said that the Commission had had before it the fifth report of the Special Rapporteur (A/CN.4/611 and Corr.1), which addressed the question of the human rights limitations on the right of expulsion and proposed seven draft articles. The Special Rapporteur, while emphasizing the general obligation of States to respect human rights, had suggested a pragmatic approach focusing on the "fundamental" human rights and on those human rights the implementation of which was required by the specific circumstances of persons being expelled. That approach was spelled out in draft article 8. The report then analysed a number of rights, considered "inviolable" or "non-derogable", to be granted to any person subject to expulsion. Consequently, the Special Rapporteur had proposed draft articles 9 to 14, dealing, respectively, with the obligation to protect the right to life of persons being expelled; the obligation to respect the dignity of persons being expelled; the obligation to protect persons being expelled from torture and cruel, inhuman or degrading treatment; the specific case of the protection of children being expelled; the obligation to respect the right to private and family life; and the obligation not to discriminate.

53. During the plenary debate, Commission members had expressed reservations or doubts as to the general approach taken by the Special Rapporteur. Several members had held the view that persons being expelled were entitled to full respect of all their human rights, subject only to those limitations that were allowed under international law. Nevertheless, according to some members, the Commission should only deal, under the topic, with those human rights obligations of the expelling State that were closely related to expulsion, such as the conditions and duration of

detention prior to expulsion; certain procedural guarantees; the legal remedies to be made available to individuals facing expulsion; non-discrimination; and the conformity of an expulsion decision with the law.

54. Some members were also of the view that the draft articles should distinguish more clearly between the conditions to be respected by the expelling State regardless of the situation in the State of destination, and those relating to the risk of human rights violations in the State of destination. According to some members, the list of rights identified in the draft articles should be expanded to include, inter alia, a number of procedural rights, the right to property or the right to basic medical care, whereas some other members questioned the need for draft articles on specific human rights.

55. With specific reference to draft article 8, regarding the general obligation to respect the human rights of persons being expelled, several Commission members had expressed the view that the scope of the provision was too narrow and that the article should be reworded to refer to all human rights of the individuals being expelled. According to some members, a reference to possible restrictions of human rights in the context of expulsion could be included in the draft article, provided that it was specified that such restrictions were subject to a number of conditions under the relevant rules of international law.

56. Several members had supported draft article 9, on the obligation to protect the right to life of persons being expelled. Comments had been made, however, with respect to paragraph 2 of the draft article, which provided that a State that had abolished the death penalty could not expel a person who had been sentenced to death to a State in which the person might be executed without having previously obtained a guarantee that the death penalty would not be carried out. The view had been expressed that there was a need to clarify the conditions under which a "guarantee" that the death penalty would not be carried out would be considered to be sufficient. Some members had also suggested that the protection should be strengthened in order to take into account the current trend towards abolition of the death penalty. In particular, it had been proposed that the prohibition should also be extended to States other than those where the death penalty had been abolished, or that its scope should be broadened to cover not only the expulsion of an individual who had already been sentenced to the death penalty to a State where he or she might be executed, but also the expulsion of an individual to a State in which he or she might be sentenced to the death penalty. According to another view, shared by the Special Rapporteur, it was difficult for the Commission to extend further the protection provided for in paragraph 2 of draft article 9, since the provision already constituted progressive development of international law.

57. Some members had supported draft article 10, which set forth the obligation to respect, in all circumstances, the dignity of a person being expelled, regardless of whether the person was legally or illegally present in the territory of the expelling State. However, other members had expressed doubts as to the need for a provision dealing specifically with the protection of dignity, arguing that respect for human dignity was the foundation of human rights in general rather than a right in itself. The Special Rapporteur had insisted, however, on retaining a specific draft article on the right to human dignity — even if that meant relocating the provision — and had emphasized that the right was established in several international instruments and in judicial precedent.

58. Among the comments made regarding draft article 11, concerning the obligation to protect persons being expelled from torture and cruel, inhuman or degrading treatment, different views had been expressed as to whether, and to what extent, the provision should also cover acts committed in a private capacity. In the light of the case law of the European Court of Human Rights, it had been proposed that the prohibition on expelling an individual to a State where there was a risk of ill-treatment by persons acting in a private capacity should be limited to situations in which the authorities of the receiving State would be unable to obviate that risk by providing appropriate protection. It had also been proposed that paragraph 1 of the draft article should be reformulated to extend the applicability of the prohibition against torture and cruel, inhuman and degrading treatment to all territories or places under the jurisdiction or control of the expelling State. The view had also been expressed that the prohibition could not be suspended in emergency situations and should take precedence over any national law that provided otherwise.

59. General support had been expressed for draft article 12, concerning the specific case of the protection of children being expelled. However, it had been stated that the meaning of the special protection

to be granted to such children should be clarified. It had also been observed that, in all cases of expulsion involving a child, the best interests of the child should prevail, and that in some cases the child's best interests might require that he or she should not be separated from adults during detention pending expulsion. Furthermore, several members had suggested that special protection should be extended to other vulnerable persons, namely the elderly, persons with physical or mental disabilities, and women, in particular pregnant women.

60. Draft article 13 dealt with the obligation to respect the right to private and family life. While several members had supported the provision, according to another view no specific article should be devoted to the right to private and family life, the scope of which transcended the issue of expulsion. Divergent opinions had also been expressed concerning the advisability of maintaining a reference to the right to private life. Although it had been suggested that the implications could be clarified in the commentary, another view had been that the right did not necessarily have a direct bearing on the question of expulsion. It had been proposed that the formulation of the draft article should be revised to make it clear that derogations from the right to family life must be in conformity with international law.

61. Despite some concerns raised in the debate as to the concrete application of the notion of a "fair balance" between the interests of the expelling State and those of the individual in question, the Special Rapporteur had insisted on retaining the reference, since it reflected the idea that, in the context of expulsion, restrictions could be placed on the right to family life in order to protect certain interests of the expelling State.

62. Draft article 14, concerning the obligation not to discriminate, had been supported by various members, although, according to one view, the inclusion of the provision was unnecessary because the scope of non-discrimination extended far beyond the issue of expulsion. Some members had considered that the provision should be placed elsewhere in the draft articles, given the general nature of the principle of non-discrimination. While some members had emphasized that the discrimination prohibited under the draft article was discrimination among the aliens who were subject to expulsion, and not discrimination between such aliens and the nationals of the expelling State, others had expressed the view that any expulsion based on discrimination against aliens vis-à-vis the rest of the population of the expelling State should also be prohibited.

63. Doubts had also been expressed as to whether the principle of non-discrimination existed independently of the enjoyment of specific rights. It had also been stated that legitimate grounds for differentiating between categories of aliens for purposes of expulsion might exist in certain cases. Furthermore, some members had proposed that other prohibited grounds for discrimination — such as age, disability or sexual orientation — should be mentioned in draft article 14.

64. In order to respond to some of the concerns raised by members in the plenary debate, with regard to the proposed general approach and the structure, content and formulation of the set of draft articles dealing with the protection of human rights of persons being expelled, the Special Rapporteur had presented a revised and restructured version of the draft articles (A/CN.4/617), which would be considered by the Commission at its sixty-second session. The Special Rapporteur had also submitted to the Commission a new draft workplan with a view to restructuring the draft articles (A/CN.4/618). The Special Rapporteur had indicated that in his future reports he would examine the problems of disguised expulsion, expulsion on grounds contrary to the rules of international law, conditions of detention and treatment of persons being expelled, before turning to procedural questions.

65. The Commission would welcome information and observations from Governments on the grounds for expulsion provided for in national legislation; the conditions and duration of custody or detention of persons being expelled in areas set up for that purpose; whether a person who had been unlawfully expelled had a right to return to the expelling State; and the nature of the relations established between the expelling State and the transit State in cases where the person being expelled must pass though a transit State.

66. **Mr. Alsvik** (Norway), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that he welcomed the presence of members of the Commission and regretted that financial constraints had prevented some of the special rapporteurs from attending. The Nordic delegations looked forward to the contributions of the Study

Groups dealing with the topics "Most-favoured-nation clause" and "Treaties over time". They also hoped that it would be possible in 2010 to consider an entire set of draft guidelines on reservations to treaties. The format of the Guide to Practice should be made as user-friendly as possible; that might require some restructuring and a good index.

67. With regard to the topic "Expulsion of aliens", drawing up a list of rights that must be respected in situations of expulsion was not the most appropriate approach, given the existence of instruments on human rights and refugee law that were relevant to expulsion. All human rights must be respected, including with variations at the regional level. The indivisible nature of human rights was also a principle of paramount importance.

68. As to the topic "Shared natural resources", the Nordic delegations continued to believe that the management challenges relating to transboundary oil and gas reserves were very different from those relating to transboundary aquifers. Whereas transboundary aquifers might by their nature have an impact on or be of concern to a large number of States, that was not the case for transboundary hydrocarbon deposits. The specific and complex issues relating to such reserves had been adequately addressed in bilateral relations and did not appear to be causing insurmountable problems in practice. Legal certainty was the key issue. Under international law, States had a sovereign right to exploit their resources and a duty to cooperate where such resources were shared; they entered into bilateral agreements to handle individual cases. In practice, those factors were key to ensuring rational, effective and equitable exploitation between neighbours. It would therefore be more practical for the Commission to note the existence of such practice rather than attempt a process of codification.

69. The Nordic delegations welcomed the progress made by the Commission on the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)", which was a subject of significant practical importance inasmuch as States and other subjects of international law were frequently faced with determining the scope and application of relevant conventions. The topic was distinct from, yet in several ways related to, the principle of universal jurisdiction; it was a key principle for eliminating impunity and was central to ensuring that there were no safe havens for those responsible for the most serious crimes. The Nordic delegations looked forward to more substantial discussion of the topic in the Committee during the sixty-fifth session of the General Assembly, based on input from the Commission.

70. **Mr. Trauttmansdorff** (Austria) said that, on the topic of reservations to treaties, his delegation concurred with the content of guideline 2.4.0 regarding the written form of interpretative declarations. Although it was true that such declarations were not subject to any formal requirements, a depositary could hardly fulfil its function to disseminate interpretative declarations unless they were formulated in writing.

71. The fact that guideline 2.8.1 did not distinguish between permissible and impermissible reservations created the impression that the effect of silent acceptance related to both categories of reservations. Although the effect of reservations and of reactions to reservations would be dealt with in the fourth part of the Guide to Practice, it was necessary to differentiate between permissible and impermissible reservations in the section on acceptance of reservations, since the term "acceptance" implied a certain legal effect. Indeed, distinguishing between permissible and impermissible reservations was called for in all guidelines, since the legal effect of the reaction to them was not the same.

72. As far as acceptance of a reservation to the constituent instrument of an international organization was concerned, it was not clear that guidelines 2.8.7 and 2.8.8 added value to article 20, paragraph 3, of the Vienna Convention on the Law of Treaties, or whether they clarified or complicated the legal situation. Guideline 2.8.8 defined the organ competent to accept a reservation in a way that suggested a competent State organ. The list of organs seemed logical but was not necessarily complete. The guidelines in question should more clearly take into account that the parties to the constituent treaty remained the masters of that treaty, although, in accordance with the Vienna Convention, the organization itself, through its competent organ, was also required to react to a reservation. It might not always be clear, however, whether a given organ had the indisputable power to accept or object to a reservation. The legal effects of the non-acceptance of a reservation by one or more parties to the constituent treaty, while the competent organ remained silent, should be addressed in the guidelines. Furthermore, the question of the procedure to follow if doubts were raised as to the exclusive

powers of a certain organ to accept or object to a reservation should also be addressed. Guidelines 2.8.7 and 2.8.9, read together, seemed to suggest that silence on the part of the competent organ amounted to a rejection of the reservation. If that was intended, the point should be more clearly expressed.

73. As early as the United Nations Conference on the Law of Treaties held in Vienna in 1968, the Austrian delegation, in an amendment proposal, had raised the issue of the legal effect of reservations made prior to the entry into force of the constituent instrument. According to its proposed amendment to article 20, paragraph 3, of the Vienna Convention, the effect of the reservation should remain undetermined until the relevant organ of the organization was actually constituted and was able to express its acceptance. Guideline 2.8.10 took a different approach, which the Commission justified on practical grounds but which left some important questions unanswered. The approach did not seem to take into account that often only a limited number of States might sign the constituent instrument of a universal international organization immediately after its adoption. An early reservation could only be objected to by the signatories at that time. In theory, if the first signatory formulated a reservation, no objection would be possible at all. However, States that became parties at a later date would then be bound by the accepted reservation. Such a situation could lead to undesired results; States might, for instance, reconsider their decision to join the organization. For that reason, Austria would prefer to follow the approach reflected in the Austrian amendment proposed at the Vienna Conference.

74. On the subject of interpretative declarations, in order to deal properly with the formal and procedural requirements, greater clarity was needed on the effects of interpretative declarations. For instance, there was as yet no decision on whether interpretative declarations might, like reservations, have a reciprocal effect. As to the recharacterization of an interpretative declaration, addressed in guideline 2.9.3, excellent examples could be found in the practice of States parties to the Rome Statute of the International Criminal Court who had characterized certain declarations as reservations prohibited by the Statute.

75. With regard to assessing the permissibility of reservations, the multitude of competent actors listed in guideline 3.2 entailed the risk of divergent assessments. All the actors listed in the guideline were, under certain conditions, entitled to assess permissibility, but the effect of the assessment differed. Whereas an assessment by a party to the treaty could have effect only for the party itself, an assessment by a treaty body might affect all the parties, provided the body possessed the necessary competence (which, however, might only rarely be beyond doubt in practice). A judgement by a dispute settlement body had effect only for the parties to the dispute. If the various actors disagreed in their assessment, the situation might complicate the application of the treaty.

76. The Commission had discussed the competence of treaty monitoring bodies to assess the permissibility of reservations in 1997 and had developed preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties. Guideline 3.2.1 was very carefully drafted as regards the legal effect of assessments by a treaty monitoring body. However, it was doubtful whether the Guide to Practice should assume the function of expressing recommendations to States regarding the competences of treaty bodies. If the Commission proceeded in that direction, it could easily find many other possible recommendations to make in connection with reservations and interpretative declarations. It was useful that the Commission had separated the preliminary conclusions from the Guide to Practice, since the objectives were different. Whereas the Guide to Practice attempted to fill gaps in the legal regime on reservations, the preliminary conclusions expressed recommendations to States regarding the management of reservations, in particular through treaty bodies.

77. In relation to guidelines 3.3, his delegation shared the view that, the Vienna Convention on the Law of Treaties did not justify distinguishing between the consequences of the different grounds for non-permissibility, whether prohibition by the treaty or incompatibility with its object and purpose. His delegation likewise concurred that guideline 3.3.1, which addressed the question of international responsibility with respect to impermissible reservations, rightly distinguished between treaty law and the law of State responsibility, a position supported by the International Court of Justice in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*.

78. The fourth part of the Guide to Practice would undoubtedly be the most important part, as it would set out the legal effect of permissible and impermissible

reservations, interpretative declarations and objections to reservations. His delegation looked forward to reviewing those guidelines at the sixty-fifth session of the General Assembly.

79. On the topic of expulsion of aliens, further discussions on the basic concept of the project should take place within the Commission. It was also necessary to explore further the question of applying human rights in the context of expulsion. The wording of draft article 8 could raise fundamental questions; as it could be asked whether States were bound to respect only some human rights when expelling an alien or whether certain human rights enjoyed priority over others within the regime. His delegation understood that the intention of the Special Rapporteur was to emphasize certain human rights as being particularly important in the situation of expulsion. However, such emphasis should not lead to the creation, or even the impression of the creation, of different categories of human rights.

80. General international law and universal or regional human rights conventions bound States to respect the human rights of persons under their jurisdiction. Irrespective of how far jurisdiction extended, the core obligation was quite clear, and few exceptions were allowed. His delegation therefore had doubts as to the wisdom of including draft articles referring to specific human rights to be respected "in particular". However, provisions on specific procedural rights of persons affected by expulsion should be elaborated in the draft articles.

81. **Mr. Popkov** (Belarus) said that the guidelines for reservations to treaties would result in much greater predictability and transparency in treaty law, while providing a basis for the work of international law practitioners. His delegation welcomed the efforts made to achieve maximum clarity, specificity and unambiguity in the draft guidelines. It also welcomed the memorandum by the Secretariat on reservations to treaties in the context of succession of States (A/CN.4/616) and hoped for further proposals from the Special Rapporteur on improving the practice of reservations in the light of the problems discussed in the memorandum. Study of the topic of "Treaties over time" and especially of the issue of subsequent agreement and practice, would also help to expand the scope of the topic of reservations.

82. With regard to guideline 2.4.0 on the form of interpretative declarations, it was hardly likely that a sovereign State would assume the obligation to follow a particular procedure in interpreting an international treaty. However, in the interests of all parties an interpretative declaration should be formulated in writing to ensure precision, transparency and irreversibility. The purpose of the Guide to Practice was not to elaborate generally binding rules, but rather to establish certain principles desirable for the operation of treaty law. In that sense, the word "preferably" should be omitted from guideline 2.4.0. Instead, it could be stipulated that an interpretative declaration became effective as soon as it was set down in writing — which did not prevent its being made orally in advance.

83. The language of some of the guidelines, such as 2.4.7, 2.4.8 and 2.4.10, suggested that, legally speaking, conditional interpretative declarations were closely akin to reservations. The legal regime of reservations should therefore be extended to them. It would in fact be advisable to reconsider including the notion at all.

84. In the practice of the "reservations dialogue", States and international organizations were the key actors. The role of the depositary and of monitoring and dispute settlement bodies was secondary. The functions of the depositary should be in keeping with article 77 of the Vienna Convention on the Law of Treaties and with the established practice of depositaries of universal treaties. The depositary's function of informing States parties to the treaty and States entitled to become parties of any documents and communications received in connection with the treaty should be carried out as promptly as possible, bearing in mind the time limit set in article 20, paragraph 5, of the Vienna Convention for objecting to reservations. The depositary could express its view on the permissibility of a reservation, but should not delay notification to the States concerned of its receipt. The competence of monitoring bodies to assess whether a reservation was compatible with the object and purpose of a treaty should not be substituted for the sovereign rights of the contracting States. Competence should be delegated to monitoring bodies, either by the terms of the treaty itself or by a separate agreement between the contracting parties. In any event, a view expressed by monitoring bodies should not have the same

consequences as the views of the contracting States or international organizations.

85. **Mr. Troncoso** (Chile) said that, although his delegation had hoped for more progress on some topics, the Commission's report reflected valuable accomplishments. In particular, he would like to highlight the great success of the current year's International Law Seminar for young professors and Government officials. Also very positive were the meetings with international and regional institutions involved in the codification and progressive development of international law, which could promote better understanding, cooperation and coordination between the Commission and those institutions. The Commission's meetings with legal advisers of Governments — he had had the honour to attend the most recent one in 2008 — provided a useful forum for the necessary interaction between Governments and the Commission. The current year's meeting with legal advisers of international organizations within the United Nations system had been well timed, as the Commission had been on the verge of adopting on first reading its draft articles on the responsibility of international organizations.

86. The subject of countermeasures in the draft articles on responsibility of international organizations required further careful study. Draft article 50, paragraph 4, had allayed his delegation's concern that countermeasures could hamper the functioning of the responsible international organization and thus jeopardize the achievement of the purposes for which it had been established. The rule established in draft article 51, concerning the question of whether an injured member of a responsible international organization could take countermeasures against that organization, was correct in clearly stating that the rules of the organization prevailed as *lex specialis*. However, one point that the Commission should clarify when presenting its report on second reading was whether or not countermeasures might be taken by a State or international organization which was a member of a responsible international organization in cases where the rules of the organization did not expressly or implicitly settle the issue.

87. His delegation had some concerns about the eventual fate of the draft articles in the General Assembly. The basic role of the Commission of contributing to the codification and progressive development of international law was best performed by the adoption of draft articles which then became international conventions accepted by a large number of States or customary rules reflecting a practice generally accepted as law by most of the States forming the international community. Almost a decade had elapsed since the General Assembly had confined itself to taking note of the articles elaborated by the Commission on State responsibility, and no further progress had been made on that crucial topic. The draft articles on the responsibility of international organizations should not suffer the same fate. In addition to urging a speedy decision on the convening of a diplomatic conference for the purpose of adopting a convention on the responsibility of States for internationally wrongful acts, his delegation would like to state that its position on the fate of the draft articles on the responsibility of international organizations would depend on what happened with regard to the articles on State responsibility.

88. On the topic of reservations to treaties, his delegation agreed that the final form of the work should be a Guide to Practice that did not affect or modify the 1969 and 1986 Vienna Conventions.

89. The treatment of reservations to treaties should also encompass the regime of interpretative declarations, which were not systematically covered in the Vienna Conventions. Although conceptually reservations and interpretative declarations were different procedures, they had elements that could not always be easily distinguished in specific cases. Where the treaty prohibited reservations, States sometimes made declarations that were actually reservations in disguise. In other cases, an interpretation bordered on a modification of the provisions of a particular treaty. Hence the need for sufficiently precise regulation of interpretative declarations. Once consideration of the effects of reservations, of interpretative declarations and of reactions to them had been completed, the possibility of simplifying the structure of the set of draft guidelines and reducing its length to make it more accessible should be explored.

90. The Special Rapporteur had originally proposed two draft guidelines, 2.4.0 and 2.4.3 bis that were in the nature of recommendations, that interpretative declarations should "whenever possible" be formulated in writing and communicated in accordance with the procedures for reservations. His delegation preferred the more emphatic version whereby interpretative declarations should "preferably" be formulated in

writing. That would enable other States that were entitled to express an opinion on their content to be better informed and would facilitate their dissemination.

91. Whether the procedure in case of manifestly impermissible reservations set out in guideline 2.1.8 could be applied to interpretative declarations was a decision that could be taken after it had been decided whether it should be retained in relation to reservations. Concerning reactions of interpretative declarations, his delegation considered that silence could in some cases be construed as acceptance, following proper communication of the declaration to the States concerned. Objections and recharacterizations, on the other hand, should always be express and in writing for reasons of legal certainty.

92. An interpretative declaration should not only be assessed as to whether or not it was in fact a reservation, but should also be analysed on its own merits. There might be interpretative declarations that were rightly characterized as such but were nonetheless invalid. For example, there might be treaties that stipulated that their provisions could not be interpreted in a certain specific manner or that prohibited interpretative declarations altogether. An interpretative declaration could be invalid if it did not comply with those restrictions.

93. With regard to conditional interpretative declarations in principle a State could not be denied the right to formulate a declaration of that kind. A State was free to become a party to a treaty or not and, if it did, it might do so with a conditional interpretative declaration. However, because of the possible effects of such declarations, they should be accorded very careful treatment. Some conditional interpretative declarations could border on reservations or could be considered to affect the object and purpose of the treaty. In other words, they might go beyond mere interpretation. It was therefore appropriate to recognize the right of States to recharacterize a conditional interpretative declaration as a reservation and to apply with respect to conditional interpretative declarations the rules on reactions to reservations. His delegation therefore had no fault to find with guideline 2.9.10.

94. **Ms. Wasum-Rainer** (Germany) said that the topic of reservations to treaties was relevant to a large part of the work of government legal departments. Reactions to unilateral statements embodied certain legal convictions and were a means of fulfilling the common responsibility to preserve and develop international law.

95. With regard to guidelines 3.3 and 3.3.1, which related to articles 19 to 23 of the Vienna Convention, her delegation shared the Commission's view that it was not clear from those articles what the legal effects of an impermissible reservation would be. In the case of an impermissible reservation, it could not normally be assumed that the reserving State was fully bound by the treaty. Such an interpretation would not do justice to the reserving State's evident intention not to be bound by some provision of the treaty. Moreover, it would jeopardize the universality of treaties. Disregarding reservations would in practice diminish the readiness of States to accede to major treaties.

96. As the legal effects of an impermissible reservation were not clearly regulated in the Vienna Convention, the solution might be found in State practice. States seemed to adopt a procedural approach guided by the rules on acceptance of and objections to reservations in articles 20 and 21 of the Vienna Convention. That meant that if all contracting parties accepted the reservation, the treaty would come into existence with the modification effected by the reservation. If not all contracting parties accepted the reservation, the impermissible reservation had legal effects only for those States that accepted it. If a State objected, the rules regarding the legal effects of reservations and objections applied. She would like to draw particular attention to article 20, paragraph 4 (b), of the Vienna Convention, which aimed at consensus by providing that an objection by another contracting State to a reservation did not preclude the entry into force of the treaty between it and the reserving State unless a contrary intention was definitely expressed by the objecting State.

97. Reservations regarding human rights guarantees were particularly unwelcome. The rules on reservations contained in articles 20 and 21 of the Vienna Convention scarcely seemed applicable, owing to their bilateral approach. The *erga omnes* character of human rights treaty obligations clearly conflicted with the system of the Vienna Convention. The classic rules on reservations were inadequate for the International Covenant on Civil and Political Rights, since the objective of the Covenant was to endow individuals with rights, and the principle of inter-State reciprocity had no place.

98. In recent years, a number of States had made objections to impermissible reservations to certain United Nations human rights conventions. It was worth remarking that in doing so some had expressed their conviction that the reserving State was fully bound by the convention. Previously, such an interpretation had been prevalent only among groups of States with a homogeneous legal tradition, such as the European States parties to the Convention for the Protection of Human Rights and Fundamental Freedoms. Her delegation proposed that that new aspect should be examined in greater depth. It would be helpful to the international community to receive guidance from the Commission on the legal effects of impermissible reservations to human rights treaties.

99. On the topic of expulsion of aliens, it appeared that the Commission was proceeding rather quickly, discussing chapter after chapter of the draft articles while leaving essential questions from previous sessions unanswered. The right to expulsion was inherent in the sovereignty of States. It was therefore crucial for the Commission to develop principles that were in line with relevant State practice. It was also important to reach a common understanding on the key concepts before discussing further aspects of the topic. Although the scope of the topic had already been the subject of much debate, there still seemed to be no clear delimitation of the situations to be covered.

100. German national law drew an important distinction between a State's right to expel — to oblige an alien to leave the country — and a State's right to deport an alien — to enforce the obligation to leave the country. Under German law, it could happen that the State might have taken a legally valid decision on expulsion but be unable to enforce it for reasons also defined by law. As a consequence, the alien might remain in the country for an indefinite amount of time as long as there were legal obstacles to his or her deportation, such as danger to the life or health of the individual concerned in the event of his or her deportation. The right to expel derived from the principle of State sovereignty, which included the right of a State to decide on the access of aliens to its territory, a right to which a State could refer when considering the entry of a person into its territory. A State's discretionary power was far more limited, however, where the human rights of the person to be deported were concerned. From the discussion within the Commission, it remained unclear whether the issue of deportation would be considered, for the purpose of the draft articles, as being part of the expulsion process or not. Therefore, a careful delimitation of the scope of the topic was necessary.

101. There was also a need to agree on a common definition of "aliens". It remained unclear whether persons trying to enter a country who were refused admission at the border and sent back to their country of origin (or elsewhere) were included in the exercise or not.

102. Her delegation welcomed the reference to human rights in the draft articles. A State wishing to expel an alien was bound by all the international human rights instruments to which it was a party. A general reference to those conventions seemed to be the most appropriate approach. Highlighting some human rights entailed the danger of initiating a discussion about first- and second-class human rights. That might lead to the false conclusion that a State resorting to expulsion was not bound by those human rights that were not explicitly mentioned in the draft articles.

103. With regard to the Commission's specific questions concerning national laws and practice, Germany would provide written answers in the near future.

104. **Mr. Clarke** (United Kingdom) said that the Commission's initiative of inviting comments to four specific questions on the invalidity of reservations and the effects thereof was particularly useful, as it encouraged clear responses and helped to focus the attention of participating States on specific issues.

105. The United Kingdom had some concern that use of the word "permissibility" in the draft guidelines on reservations to treaties might be open to misinterpretation. The term could mean three things: compliance with the formal procedures for formulating reservations or objections; fulfilment of the substantive requirements for validity of reservations or objections, for example, that they were not contrary to the object and purpose of the treaty or to *jus cogens*; or the capacity of reservations or interpretative declarations or reactions to them to produce legal effects. Greater clarity in terminology was needed.

106. With respect to the draft guidelines referred to the Drafting Committee but not yet provisionally adopted by the Commission, dealing with the permissibility of reactions to reservations and the permissibility of

interpretative declarations and reactions to them, his delegation would like to put on record that it found draft guidelines 3.4.1, 3.4.2, 3.5, 3.5.1 and 3.6 acceptable as they stood. However, it did not find draft guideline 3.5.2 acceptable in its current form, because the United Kingdom did not consider conditional interpretative declarations comparable to reservations. Further, it did not find draft guideline 3.5.3 acceptable, for the reason that monitoring bodies might not be best equipped to rule on the validity of reservations.

107. As regards the competence of treaty monitoring bodies, as set out in guidelines 3.2.1 to 3.2.5, his delegation considered that any role performed by a treaty monitoring body in assessing the validity of reservations (or any other role) should derive principally from the legally binding provisions of the relevant treaty, and that those same provisions were the product of free negotiation between States and other subjects of international law. He would question the wisdom of attempting to create a very high-level permissive framework for such activity when it was best left to the negotiating States to decide what powers should be assigned to any treaty monitoring body on a case-by-case basis. Similarly, the legal effect of any assessment of the validity of reservations made by a monitoring body should be determined by reference to the function entrusted to it by the treaty.

108. Regarding guideline 3.2.2, his delegation considered that where there was an express intention on behalf of negotiating States to endow a treaty monitoring body with the role of assessing the permissibility of reservations, they would act appropriately to ensure that the treaty provisions reflected that intention. The absence of any specific reference in treaty provisions to competence to assess the validity of reservations should not be interpreted as permitting a legally binding role in that respect. As regards guideline 3.2.3, dealing with the requirement to cooperate with a treaty monitoring body and to give full consideration to that body's assessment of the permissibility of reservations did not specify the extent or limits of such cooperation or consideration. It was open to question, therefore, to what extent that requirement could be deemed to be satisfied under the guideline.

109. His delegation found guideline 3.2.4 acceptable. Guideline 3.2.5 was also acceptable, assuming that both parties to a dispute had accepted (or not reserved their position in respect of) the power of the dispute settlement body to adopt legally binding decisions.

110. With respect to the form of interpretative declarations his delegations agreed that there should be no binding conditions or requirements on States to provide reasons for the making of interpretative declarations, nor should the making of interpretative declarations be restricted to a specific time period. There should be no predetermined conditions for the validity of such statements, beyond the fact that they should not frustrate the object and purpose of a treaty or contravene *jus cogens*. Similarly, there should be no binding conditions or requirements on States exercising the right to react to interpretative declarations (in the form of approval, opposition or recharacterization) beyond those of not frustrating the object and purpose of a treaty or contravening *jus cogens*. Accordingly, his delegation agreed with the content of guideline 2.9.4 in particular.

111. On expulsion of aliens, at the sixty-third session of the General Assembly the United Kingdom had stressed that the topic raised difficult and complex issues which intruded directly into the domestic sphere of States. The topic was a problematic one for the Commission to address. His delegation did not believe that it was currently a suitable topic for codification.

112. **Ms. Belliard** (France), referring to the topic of reservations to treaties and specifically the question of the permissibility of reactions to reservations, of interpretative declarations and of reactions to interpretative declarations, said that the matter of their effects raised complex questions that would require very careful consideration by the Commission when the time came to address the eagerly awaited fourth part of the Guide to Practice.

113. Although the Special Rapporteur had, for analytical purposes, drawn a distinction between the question of objections to reservations and that of acceptances of reservations, such acceptances and objections were, as indicated in draft guideline 3.4, "not subject to any condition of substantive validity", a conclusion which, he had indicated, resulted from the fact that such reactions could not be assessed independently of the validity of the reservation to which they related. Situations could conceivably arise in which the acceptance of an invalid reservation would itself be invalid, but that would not necessarily always be the case. Her delegation continued to have

very serious doubts about the purely objective notion of validity adopted by the Special Rapporteur. The discussion should instead be framed in terms of the effects produced.

114. The solution which the Special Rapporteur had proposed following the Commission's debate was even less satisfactory than the original draft guideline. It was difficult to understand the justification for asserting the non-validity of an explicit acceptance of an invalid reservation. The crux of the problem was that to affirm that an acceptance, whether explicit or not, of an invalid reservation was also invalid would directly undermine the ability of States, even collectively, to accept a reservation that some might deem invalid.

115. Her delegation also saw little merit in subjecting objections to conditions for substantive validity. As the Commission and the Special Rapporteur had indicated, the real problem lay in the effects of reservations and objections. Objections with so-called "intermediate effect" gave rise to special problems, since they purported not only to exclude the effects sought by the reserving State, but also to modify the effect of other provisions of the treaty. In that regard, the question of the compatibility of the modification with the object and purpose of the treaty might arise. The Special Rapporteur's analysis of practice in the matter was sound, however. It demonstrated that the treaty provisions which the objecting State sought to modify often were closely related to the provisions to which the reservation applied. The very unique context in which practice in respect of objections with intermediate effect had developed could not be overemphasized. Other scenarios involving objections could also be envisaged. The reserving State might consider that the treaty provisions that the objecting State sought to modify were not closely related to the reservation, or were even contrary to the object and purpose of the treaty, and might oppose the objection. Although the Special Rapporteur's proposed draft guideline 3.4.2 did not resolve the question of the effects that such objections might produce, it would be useful to emphasize that a State should not be able to take advantage of an objection to a reservation which it had formulated outside the allowable time period for formulating reservations to modify other provisions of the treaty which bore little or no relation to the provisions to which the reservation applied.

116. With respect to interpretative declarations and reactions to such declarations, it was sufficient to provide, as the Special Rapporteur had done in draft guideline 3.5, that a State could formulate an interpretative declaration unless such a declaration was prohibited by the treaty. Little more could be said about interpretative declarations and reactions to such declarations under the heading of validity; the subject had more to do with the specifics of the execution and implementation of treaty obligations.

117. As to the topic "Expulsion of aliens", some of the proposed draft articles were too general or were backed by insufficient practice to demonstrate the customary nature of their content. Her delegation looked forward to delving further next year into the very important issues addressed by the Special Rapporteur in his fifth report.

The meeting rose at 1.10 p.m.